

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7 **RENO, NEVADA**

8 GERALDINE McFADDEN,) 3:04-CV-0741-ECR-VPC
9 Plaintiff,)
10 vs.) **ORDER**
11 GREGORY KRAUSE, NANCY PEARL,)
12 CAROLYN ROBINSON, and)
13 REGIONAL TRANSPORTATION)
14 COMMISSION,)
15 Defendants.)
16

17 **I. Procedural Background**

18 On October 14, 2005, Plaintiff Geraldine McFadden ("Plaintiff"
19 or "McFadden") filed an Amended Complaint (#30) against Defendants
20 Gregory Krause, Nancy Pearl, Carolyn Robinson, and Regional
21 Transportation Commission ("Defendants" or "RTC") claiming
22 violation of Due Process under 42 U.S.C. § 1983, violation of right
23 to freedom of religion, violation of the ADEA, 29 U.S.C. § 623 et
24 seq., violation of Title VII for Religious Discrimination, 42
25 U.S.C. § 2000, violation of the ADA, 42 U.S.C. § 12112, retaliation
26 and the state law claims of defamation, intentional infliction of
27 emotional distress, violation of NRS 613.075, assault and battery,
28 retaliation, and intentional interference with prospective economic
advantage. On November 1, 2005, Defendants filed a Partial Motion

1 to Dismiss (#33), based on Fed. R. Civ. P. 12(b)(6). The motion
2 seeks to dismiss the claims in Count I, VI, VII, and XI. These
3 Counts allege claims of violation of procedural due process,
4 substantive due process, defamation, intentional infliction of
5 emotional distress, and interference with prospective economic
6 advantage. On November 21, 2005, Plaintiff responded (#35) and
7 Defendant filed a reply (#36) on December 2, 2005. The motion
8 (#33) is ripe, and we now rule on it.

9 10 **II. Statement of Facts**

11 Plaintiff was employed by Defendant Regional Transportation
12 Commission, a government agency, for eight years in its marketing
13 department. In May of 2002, at the age of 40, she was given a
14 promotion and a raise. Plaintiff claims that her position was no
15 different from her old one except that she incurred more
16 responsibilities which were impossible to manage.

17 As early as 1999, Defendant Nancy Pearl, Plaintiff's
18 supervisor, requested that McFadden remove religious items from her
19 desk area. McFadden had obliged to Pearl's requests. Pearl would
20 frequently make inappropriate comments and curse "God Damn" even
21 after repeated requests by Plaintiff for Pearl to stop using such
22 offensive language. A co-worker, John McGrath, also kept a small
23 statue of Jesus on his desk and Pearl made an offensive comment
24 concerning the religious article which McFadden overheard and was
25 offended by. McFadden also kept an article taped to her file
26 drawer about the Ten Commandments litigation in Alabama. Pearl
27 insisted that Plaintiff remove it. Pearl warned Plaintiff not to
28

1 tell anyone of the religious oriented comments. In May of 2003,
2 McFadden posted in her office a cartoon which depicted a Catholic
3 joke about Jesus Christ. Plaintiff refers to twelve similar
4 incidents where Pearl harassed Plaintiff because of her religion.
5 Also in 2003, after Palm Sunday, when McFadden brought palm fronds
6 from the Catholic church to her office, Pearl ordered the immediate
7 removal of the fronds. McFadden claims Pearl had the same reaction
8 the previous Palm Sunday.

9 Pearl complained to Defendant Gregory Krause concerning
10 Plaintiff's behavior. Krause and RTC did not question Pearl's
11 treatment of Plaintiff and never sought to investigate the matter.
12 Plaintiff claims that Krause never investigated the matter because
13 he sought to fire Plaintiff on the basis of her age.

14 McFadden was disciplined with a one week suspension without
15 pay for leaving her computer turned on to the Internet when she was
16 studying on her own time for a computer-based college course paid
17 for by RTC. She was thereafter placed on probation.

18 In March of 2003, McFadden was involved in a serious car
19 accident. In addition, McFadden was put on pain killers as a
20 result of the accident in aid of her recovery.

21 On May 30, 2003, Plaintiff was directed by her supervisor,
22 Carolyn Robinson, to check in to a mental health facility.
23 Plaintiff was threatened with termination should she not comply
24 with Robinson's orders. McFadden was evaluated at the facility and
25 immediately released. However, even after her release, Krause,
26 Robinson and RTC then tried to prevent McFadden from returning to
27 work.

1 On June 30, 2003, Pearl attacked McFadden while she was using
2 the copying machine. Pearl grabbed McFadden by the left elbow,
3 spinning her around and, she claims, wrenching her shoulder,
4 causing her great pain. Plaintiff complained to Krause about the
5 behavior but Krause took no action against Pearl.

6 Plaintiff claims that during her time with RTC, she was
7 regarded as disabled because she was suffering from mental
8 complications and was on medication for such complications.

9 Plaintiff was terminated in August of 2003. Thereafter,
10 Plaintiff filed discrimination charges with the EEOC and then
11 attempted to gain new employment with the Washoe County Sheriff's
12 department, a job, she claims, she was well qualified for.
13 Plaintiff claims that Defendant RTC refused to give Washoe County
14 Sheriff's Department her dossier thereby creating the false
15 impression that there was something wrong with her files and
16 causing her to lose the employment opportunity with the Washoe
17 County Sheriff's office.

18 19 **III. Discussion**

20 **A. Standard of Review**

21 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only
22 be granted if "it appears beyond doubt that plaintiff can prove no
23 set of facts in support of his claim which would entitle him to
24 relief." Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545
25 (9th Cir. 1996). On a motion to dismiss, "we presum[e] that
26 general allegations embrace those specific facts that are necessary
27 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.

1 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
2 871, 889 (1990)) (alteration in original). Moreover, "[a]ll
3 allegations of material fact in the complaint are taken as true and
4 construed in the light most favorable to the non-moving party." In
5 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)
6 (citation omitted).

7 Although courts generally assume the facts alleged are true,
8 courts do not "assume the truth of legal conclusions merely because
9 they are cast in the form of factual allegations." W. Mining
10 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
11 "[c]onclusory allegations and unwarranted inferences are
12 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
13 F.3d at 1403 (citation omitted).

14 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
15 normally limited to the complaint itself. See Lee v. City of Los
16 Angeles, 250 F.3d 668, 688 (9th Cir. 2001). If the district court
17 relies on materials outside the pleadings in making its ruling, it
18 must treat the motion to dismiss as one for summary judgment and
19 give the non-moving party an opportunity to respond. Fed. R. Civ.
20 P. 12(b); see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir.
21 2003). "A court may, however, consider certain materials --
22 documents attached to the complaint, documents incorporated by
23 reference in the complaint, or matters of judicial notice --
24 without converting the motion to dismiss into a motion for summary
25 judgment." Ritchie, 342 F.3d at 908.

26 If documents are physically attached to the complaint, then a
27 court may consider them if their "authenticity is not contested"

1 and "the plaintiff's complaint necessarily relies on them." Lee,
2 250 F.3d at 688 (citation, internal quotations and ellipsis
3 omitted). A court may also treat certain documents as incorporated
4 by reference into the plaintiff's complaint if the complaint
5 "refers extensively to the document or the document forms the basis
6 of the plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
7 adjudicative facts or matters of public record meet the
8 requirements of Fed. R. Evid. 201, a court may judicially notice
9 them in deciding a motion to dismiss. Id. at 909; see Fed. R.
10 Evid. 201(b) ("A judicially noticed fact must be one not subject to
11 reasonable dispute in that it is either (1) generally known within
12 the territorial jurisdiction of the trial court or (2) capable of
13 accurate and ready determination by resort to sources whose
14 accuracy cannot reasonably be questioned.").¹

16 **B. Evaluation of Claims**

17 **1. Violation of Rights under § 1983**

18 Defendants claim that Plaintiff's first cause of action,
19 violation of rights under 42 U.S.C. § 1983 should be dismissed
20 because she has failed to state a claim either for violation of her
21 procedural due process rights or of her substantive due process
22 rights.

25 ¹Defendants attached extraneous exhibits to their reply (#36).
26 In this order the Court will not consider these documents. The Court
27 is here considering a motion to dismiss, pursuant to Fed. R. Civ. P.
28 12(b)(6). The Motion (#33) has not been converted to a motion for
summary judgment.

1 Plaintiff claims that she was placed first on probation for
2 using the Internet while she was studying which prevented her from
3 having a hearing when she was ultimately fired.

4 It is still difficult to discern from Plaintiff's Complaint
5 what the exact violation of Due Process is claimed to be. Either,
6 Plaintiff claims that her due process rights were violated when she
7 was placed on probation without notice or opportunity to respond or
8 her due process rights were violated when she was ultimately fired
9 in 2003 without notice or opportunity to respond.

10 In addition, it is still unclear whether Plaintiff had a
11 property interest in her employment as either a permanent employee
12 when her status was changed to a probationary employee or as a
13 probationary employee. As we held in our previous order, the
14 Supreme Court has held that property interests are unique in that
15 they are created by state law or by implied contract. Roth, 408
16 U.S. at 577. It is unclear as to whether Plaintiff may have had a
17 property interest in her employment as either a permanent employee
18 or as a probationary employee based on implied rights that she had.
19 Perry v. Sindermann, 408 U.S. 593 (1972) (although no explicit
20 tenure system existed at the institution, a de facto tenure system
21 did exist and that proof would entitle the plaintiff to a hearing).

22 As we stated in our previous order, we do not need to decide
23 whether Plaintiff had a property right in her employment because
24 Plaintiff failed in her Amended Complaint to plead the second
25 element required to establish a cause of action for violation of
26 procedural due process. The second element is that the Plaintiff
27 must prove that her property interest was deprived without due
28

1 process. Here, Defendants claim that Plaintiff, even as a
2 probationary employee, was afforded procedures for challenging her
3 termination. Defendants cite RTC Personnel Rules again to
4 demonstrate that Plaintiff had the right to appeal the decision
5 regarding her termination. Plaintiff again claims that appealing
6 the decision would have been "futile."² However, such a statement
7 is an unwarranted allegation and does not help to explain why
8 procedural due process rights were not afforded in the appeal
9 process should Plaintiff have chosen to appeal the termination
10 decision.

11 **b. Procedural Due Process - Record Withholding**

12 Plaintiff also claims that Defendants' refusal to give
13 Plaintiff her employment records is a violation of procedural due
14 process. Plaintiff claims that she has a liberty interest in
15 seeking new and alternative employment and that Defendants deprived
16 her of those records without due process of law.

17 In Roth, the Supreme Court held that a public employer could
18 be held liable for a procedural due process violation for
19 terminating an employee if the employer made a charge that "might
20 seriously damage [the terminated employee's] standing and
21 associations in his community" or "imposed on a [terminated
22 employee] a stigma or other disability that foreclosed his freedom
23 to take advantage of other employment opportunities." Roth, at
24 573. The Court said that the requisite stigma could result from a

25
26 ²Although Plaintiff claims that because of a Collective
27 Bargaining Agreement, she had no grievance procedure, she still admits
28 that an appeal would have been possible but claims she refused to
appeal because such an appeal would have been futile.

1 charge of "dishonesty" or "immorality." Id. "Charges that
2 unfairly stigmatize must amount to accusations of dishonesty or
3 immorality." Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992);
4 LaForge v. Crowley, 1999 U.S. App. LEXIS 976, at *6-7 (9th Cir.
5 1999). A liberty interest is established where the accuracy of a
6 charge of dishonesty or immorality is contested, the charge is made
7 public and the charge is made in connection with termination of the
8 employment. Jones v. City of Phoenix, 1994 U.S. Dist. LEXIS 18522,
9 at *7 (D. Or. 1994).

10 Although Plaintiff claims that Defendants' refusal to give the
11 Washoe County Sheriff's Office her file created the sense that
12 there was something wrong with the file, Plaintiff fails to allege
13 any facts demonstrating that Defendants did anything that would
14 stigmatize the Plaintiff along the lines of charging Plaintiff with
15 dishonesty or immorality. As we stated in our previous decision,
16 Plaintiff does not claim that Defendants made statements to Washoe
17 County Sheriff's Office that were false, and that her reputation
18 and employment opportunities were compromised because of those
19 statements. She simply claims that a failure to turn over the
20 documents created the feeling that there was something wrong with
21 her dossier. Without more, Plaintiff cannot prove that her liberty
22 interests were deprived. Campanelli v. Bockrath 100 F.3d 1476 (9th
23 Cir. 1996) (holding that statements made by the employer to the
24 local news concerning the employees discharge raised significant
25 stigma to withstand a motion to dismiss); LaForge (former
26 employee's charges were properly dismissed where employee had not
27 alleged publication of the reasons for his non-re-appointment);
28

1 Haimowitz, 579 F.2d at 529 (holding plaintiff's liberty interest
2 claim failed because he did not "allege that the University in any
3 way publicized false, defamatory, or stigmatizing statements about
4 him in connection with his termination. In fact, no reasons at all
5 were ever made public.")

6 Because in our previous Order, we instructed Plaintiff on how
7 to amend her Complaint to meet the requirements to plead a
8 procedural due process claim and because Plaintiff has failed to
9 meet those requirements, we find that leave to amend should not be
10 granted with respect to this claim. Therefore, we will grant
11 Defendants' motion to dismiss the claim of procedural due process
12 on both the issue of the withholding of the personnel file and the
13 decision to terminate Plaintiff.

14 **c. Substantive Due Process**

15 The Due Process Clause of the Fourteenth Amendment includes a
16 substantive component that guards against arbitrary and capricious
17 government action, even when the decision to take that action is
18 made through procedures that are in and of themselves
19 constitutionally adequate. Smith v. City of Fontana, 818 F.2d 1411
20 (9th Cir. 1987). Substantive due process is violated at the moment
21 the harm occurs and, therefore, the existence of a post-deprivation
22 state remedy does not have any bearing on whether a cause of action
23 exists under 42 U.S.C. § 1983. Rutheford v. City of Berkely, 780
24 F.2d 1444, 1447 (9th Cir. 1986). To establish a violation of
25 substantive due process, the Plaintiff must prove that the
26 government's action was clearly arbitrary and unreasonable, having
27 no substantial relation to the public health, safety, morals or

1 general welfare. Village of Euclid v. Amber Realty Co., 272 U.S.
2 365, 395 (1926); see Moore v. City of East Cleveland, 431 U.S. 494,
3 498 n.6 (1977). The court will look at such factors as the need
4 for the governmental action in question, the relationship between
5 the need and the action, the extent of the harm inflicted and
6 whether the action was taken in good faith or for the purpose of
7 causing harm. Sinaloa Lake Owners Asso. v. Simi Valley, 882 F.2d
8 1398, 1409 (9th Cir. 1989).

9 Plaintiff claims that Defendants violated her Fourteenth
10 Amendment right to substantive due process by allowing Pearl to
11 commit physical aggression against her and by forcing Plaintiff to
12 enter a mental health institution against her will.

13 We find that Plaintiff's allegations as plead are sufficient
14 to state a cause of action for violation of substantive due process
15 under the Fourteenth Amendment. Plaintiff has provided sufficient
16 basis upon which a substantive due process claim would be plead
17 both regarding Pearl's behavior and the involuntary confinement to
18 the mental institutions.

19 The Supreme Court has held that mentally ill individuals have
20 substantive due process rights during an involuntary commitment in
21 a state institution. Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct.
22 2453, 2460 (1982). Here, the actions of Defendants would seem
23 unreasonable as plead in Plaintiff's Complaint especially in light
24 of the fact that mentally ill patients have been afforded
25 substantive due process rights before involuntary confinement.

26 Therefore, Defendants' Motion to Dismiss the claim of
27 substantive due process violation will be denied.

1 **2. Defamation**

2 Defendants allege that Plaintiff has failed to plead facts
3 that would support a claim for defamation.

4 Under Nevada law, in order to establish a prima facie case
5 for defamation, a plaintiff must prove: "(1) a false and defamatory
6 statement by defendant concerning the plaintiff; (2) an
7 unprivileged publication to a third person; (3) fault, amounting to
8 at least negligence; and (4) actual or presumed damages." Simpson
9 v. Mars, 113 Nev. 188, 190 (Nev. 1997) (citing Chowdhry v. NLVH,
10 Inc., 109 Nev. 478, 483 (1993)). Here Plaintiff has failed to
11 allege facts that show Defendants made a false or defamatory
12 statement about her and thus Plaintiff's claim for defamation must
13 be dismissed.

14 In her amended complaint, Plaintiff alleges that Defendants
15 defamed her when Defendants removed McFadden from the workplace in
16 front of her co-workers and forced her to enter a mental health
17 facility, (2) the mental health center was intended to treat only
18 addiction and substance abuse problems, and (3) Defendants
19 precluded Plaintiff from returning to work for several days,
20 thereby creating the impression that she did have mental problems.

21 In our previous Order, we explained to Plaintiff that her
22 allegations of defamation were insufficient because she relied on
23 actions taken by Defendants and not statements made (which is a
24 requirement for a prima facie case of defamation). Although
25 Plaintiff has amended her Complaint to include different acts
26 Defendants committed, Plaintiff still relies upon the acts of
27 Defendants and not statements made about Plaintiff.

1 Plaintiff's only charge of a "statement" specifies:
2 "Defendants RTC and Robinson seized upon this circumstance, and
3 deliberately acted as though and made false statements to the
4 effect that McFadden was mentally ill; although the [sic] knew of
5 [sic] had reason to know that she was only [sic] on prescription
6 pain drugs that could cause an appearance of sedation." In order
7 to survive a motion to dismiss on a defamation claim, Plaintiff
8 must put forth all the elements of a defamation claim including the
9 specific statements, publication and fault. Lubin v. Kunin, 117
10 Nev. 107, 111 (2001). Plaintiff has failed to plead the specifics
11 of any statements, which were published to third parties, as well
12 as the element of fault.

13 As Plaintiff might be able to amend her Complaint to plead
14 specific statements made by RTC and Robinson, when the statements
15 were made, and to whom they were made, Plaintiff's claim of
16 defamation is dismissed with leave to amend.

18 **3. Intentional Infliction of Emotional Distress**

19 To recover for the intentional infliction of emotional
20 distress, a plaintiff must establish the following elements: "(1)
21 that the defendant's conduct was extreme and outrageous; (2) that
22 the defendant either intended or recklessly disregarded the causing
23 of the emotional distress; (3) that the plaintiff actually suffered
24 severe or extreme emotional distress; and (4) that the defendant's
25 conduct actually or proximately caused the distress." Nelson v.
26 Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141 (1983) (citing Star v.
27 Rabello, 97 Nev. 124, 625 P.2d 90 (1981)).

1 Plaintiff has failed to comply with the instructions
2 contained in our previous Order with respect to this claim. We
3 found previously that Plaintiff could not prove her claim of
4 intentional infliction of emotional distress because she has not
5 alleged that she suffered severe or extreme emotional distress as a
6 result of Defendants' actions. Although Plaintiff was arguably
7 faced with circumstances including battery and public humiliation
8 from having to be forced into a mental institution, she still has
9 not alleged any facts pointing to any extreme emotional distress as
10 a result of these incidents. Plaintiff has simply made a
11 conclusory allegation.

12 Plaintiff's claim as to intentional infliction of emotional
13 distress as to all Defendants, therefore, will be dismissed without
14 leave to amend.

15 16 **4. Intentional Interference with Advantageous Economic Relations**

17 In Nevada, Plaintiff claiming intentional interference with
18 advantageous economic relations must prove a prima facie case
19 including: "(1) a prospective contractual relationship between the
20 plaintiff and a third party; (2) the defendant's knowledge of this
21 prospective relationship; (3) the intent to harm the plaintiff by
22 preventing the relationship; (4) the absence of privilege or
23 justification by the defendant; and, (5) actual harm to the
24 plaintiff as a result of defendant's conduct." Consolidated
25 Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 114 Nev. 1304,
26 1311, 971 P.2d 1251, 1255 (1988) (citations omitted).

1 We find that Plaintiff has failed to plead the first three
2 elements required for a claim of interference with advantageous
3 economic relations. Although Plaintiff has shown that she sought a
4 job with Washoe County Sheriff's Department, she has failed to show
5 that such a search amounted to "a prospective contractual
6 relationship." Plaintiff has not provided information on whether
7 Washoe County was indeed hiring, and whether there were indeed
8 "prospective contractual relations."

9 In addition, although Plaintiff has demonstrated that
10 Defendants refused to send over Plaintiff's employment records, she
11 has failed to plead that Defendants' intent in not sending over the
12 records was to prevent a contractual relationship between Plaintiff
13 and the Sheriff's Department.

14 Because Plaintiff has failed to plead that Defendants
15 intended to harm a prospective contractual relationship and that
16 Plaintiff and the Sheriff's Department were indeed in a
17 "prospective contractual relationship," Plaintiff's claim of
18 interference with prospective contractual relations will be
19 dismissed with leave to amend.

20 **IT IS HEREBY ORDERED** Defendants' Motion to Dismiss (#33) as
21 to Claim I (procedural due process) and Claim VII (intentional
22 infliction of emotional distress) is **GRANTED** without leave to
23 amend. Defendants' Motion to Dismiss (#33) Claim I (substantive
24 due process) is **DENIED**. Defendants' Motion to Dismiss (#33) Claim
25 VI (defamation) and Claim XI (Interference with Prospective
26 Economic Advantage) are **GRANTED** with leave to amend.

1 Plaintiff shall have fifteen (15) days within which to file a
2 second amended complaint.

3
4 This 15th day of February, 2006.

5 
6 UNITED STATES DISTRICT JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28